ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIAM WARD,

Plaintiff-Appellee,

vs.

CONSOLIDATED RAIL CORPORATION,
d/b/a Conrail, a Pennsylvania corporation,

Defendant-Appellant.

Supreme Court No.: 124533
Court of Appeals No.: 234619
Wayne County Circuit
Court No.: 99-903048-NO

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124533

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT CONSOLIDATED RAIL CORPORATION IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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PROCEDURAL HISTORY

On October 1, 2004, the Michigan Supreme Court entered an Order directing the Clerk to schedule oral argument on whether to grant Consolidated Rail Corporation's application for leave to appeal or take other peremptory action permitted by MCR 7.302(G)(1). This Court's Order directed the parties to address whether the trial court correctly determined that plaintiff was entitled to a presumption that certain missing evidence was defective (namely a locomotive handbrake unavailable at trial), whether the jury was properly instructed, and whether any error was harmless.

SUMMARY OF FACTS

Plaintiff's Complaint in this matter arose out of an unwitnessed and unreported accident that allegedly occurred on February 19, 1998 during the course of plaintiff's employment with defendant, Consolidated Rail Corporation (Conrail) in Bryan, Ohio. When plaintiff reported the incident the next day, he claimed to have injured his back while attempting to apply a handbrake on his locomotive. After filing suit, plaintiff eventually claimed the handbrake lever had stopped in mid-application because a repair link in the brake chain was purportedly too large and had become jammed in the gears of the handbrake.[1]

[1] Although not relevant to the instant discussion, plaintiff misrepresented at page one of his brief in opposition to defendant's application that Conrail had admitted "the handbrake was unsafe and jeopardized employee safety." Neither the evidence, nor any ruling by the trial court, supported such a claim.

ARGUMENT

I. THE TRIAL COURT INCORRECTLY DETERMINED ON FEBRUARY 18, 2000 THAT PLAINTIFF WAS ENTITLED TO A PRESUMPTION THE "MISSING" HANDBRAKE WAS DEFECTIVE:

On February 18, 2000, the trial court heard argument on plaintiff's motion for summary judgment. Plaintiff contended the handbrake involved in his claimed accident was defective in violation of the Federal Safety Appliance Act: (1) because plaintiff had reported that the handbrake had stopped unexpectedly in mid-application; and (2) since the handbrake had been discarded some time after plaintiff's incident, the trial court could presume the handbrake was defective.

In opposition to plaintiff's motion, Conrail provided to the trial court the deposition testimony of trainmaster, Thomas Barr, and locomotive machinist, Raymond Chandler, the individuals who returned the handbrake to normal railroad service after being unable to find any defect or operational difficulty with the handbrake at the time of their inspection and testing on February 20, 1998 (after plaintiff had finally reported his claimed accident). Conrail also presented the affidavit of Jeffrey Chandler, the maintenance supervisor involved in the replacement of the handbrake nearly three weeks after plaintiff's claimed accident. The evidence produced by Conrail prior to the February 18, 2000 hearing (which was uncontradicted by plaintiff) demonstrated:

1. On February 15, 1998 (four days before plaintiff's claimed accident), the handbrake and chain were found to be free of any defect as a result of the federally mandated inspection and testing on that date. [Defendant's application for leave, Exhibit 4, J. Chandler affidavit, paragraph 4].

2. On February 20, 1998 (after plaintiff reported his alleged accident), the handbrake and chain were again found to be free of any defect or other operational difficulty by both trainmaster, Thomas Barr, and locomotive machinist, Raymond Chandler. [TR Vol. IV; Deposition of T. Barr, pp. 57-58] [TR Vol. IV; R. Chandler at pp. 49, 56-58, 60-61, 63, 76-81, 85-89].

3. On and after February 20, 1998, the subject locomotive handbrake was used by various railroad employees on a daily basis for the next seventeen days without incident. [TR Vol. IV at 98; Deposition of T. Barr, pp. 43-44, 48].

4. On March 9, 1998, a difficulty with the release lever on the handbrake (a separate device, different from plaintiff's purported difficulty with the application lever on February 19, 1998) prompted an inspection which demonstrated the handbrake could not be released (unlike plaintiff's unsubstantiated difficulty in applying the handbrake). [TR Vol. IV at 98; Deposition of T. Barr, pp. 47-49].

5. On March 11, 1998 (after the locomotive and handbrake were transported to defendant's shop in Elkhart, Indiana), Jeffrey Chandler (the supervisor in charge of replacing the handbrake) was unaware that plaintiff, William Ward, was claiming to have sustained an injury while using the application lever of the handbrake on February 19, 1998. [Defendant's application for leave, Exhibit 4, J. Chandler affidavit, paragraph 10].

6. On March 11, 1998, a repair link (clevis) present on the subject handbrake chain was noted by Jeffrey Chandler to be the standard, ordinary type of repair link regularly used by Conrail. [Defendant's application for leave, Exhibit 4, J. Chandler affidavit, paragraph 9].

7. On March 11, 1998, the handbrake assembly and brake chain were replaced in the regular course of business consistent with the standard maintenance practices of Conrail. [Defendant's application for leave, Exhibit 4, J. Chandler affidavit, paragraph 10].

8. On March 11, 1998, Jeffrey Chandler did not deliberately or intentionally destroy potential evidence concerning plaintiff's claimed accident in this case. [Defendant's application for leave, Exhibit 4, J. Chandler affidavit, paragraph 11].

Notwithstanding the above uncontroverted evidence explaining why the handbrake had not been retained by Conrail, the trial court ruled on February 18, 2000 that plaintiff was "entitled to a presumption that the handbrake was defective because it was destroyed." [Defendant's application for leave, Exhibit 5, February 18, 2000 hearing transcript, p.12] [Defendant's application for leave, Exhibit A, Court Order of March 31, 2000]. The trial court's February 18, 2000 "presumption" ruling was erroneous in the following respects:

1. A "presumption" that non-produced evidence would have been adverse to the non-producing party exists only where there is evidence of "intentional fraudulent conduct and intentional destruction of evidence." *Trupiano v. Cully*, 349 Mich. 568, 570; 84 N.W. 2d 747 (1957); *Lagalo v. Allied Corporation* (on remand), 233 Mich. App. 514, 520; 592 N.W. 2d 786 (1991). In the present case, there was no such evidence that Conrail had engaged in any fraudulent conduct to intentionally destroy evidence.

2. The trial court was required to conduct an analysis of the party's arguments prior to imposing any sanction for a party's alleged failure to preserve evidence. *Citizens Insurance Company of America v. Juno Lighting, Inc.*, 247 Mich. App. 236, 243; 635 N.W. 2d 379 (2001). The trial court in the instant case made no attempt at the February 18, 2000 motion hearing to analyze or explain the court's reasoning in determining that any "presumption" existed, given the

uncontradicted reasonable explanation presented by defendant as to why the handbrake was unavailable.

3. It was improper for the trial court to allow the jury to learn of any "presumption," once the defendant had presented evidence sufficient to rebut such a presumption. *Widmayer v. Leonard,* 422 Mich. 280, 288-289; 373 N.W. 2d 538 (1985); *State Farm Mutual Automobile Insurance Co. v. Allen , et. al.*, 191 Mich. App. 18, 22; 477 N.W. 2d 445 (1991). In the present case, any possible basis for a "presumption" concerning the handbrake had been rebutted by the evidence produced by Conrail before the February 18, 2000 hearing which demonstrated the handbrake had been found free of any defect and returned to normal service for seventeen days, afterwhich the handbrake was discarded in the ordinary course of business as a result of an unrelated operational difficulty.

4. In addition to incorrectly concluding that a "presumption" existed, the trial court's ruling improperly invaded the province of the jury by determining that the unavailable handbrake was "defective." Although no missing evidence ruling or instruction was necessary at all given the continued use of the handbrake for seventeen days after plaintiff's alleged accident, the trial court at most should have ordered on February 18, 2000 that defendant's failure to produce the handbrake would allow the jury to later infer the evidence would have been adverse to defendant, if the jury believed no reasonable excuse for defendant's failure to produce the handbrake had been shown. M Civ JI 6.01(c).

5. Given the fact that the subject handbrake had undergone a comprehensive inspection and testing on February 20, 1998, which disclosed no operational defect or abnormality, and the fact that the handbrake had been used by various employees of the railroad during the next seventeen days before a different difficulty arose with the release lever, there was

no basis for Conrail to anticipate that it would be necessary to retain the handbrake for any future evidentiary purpose.

6. Plaintiff was not prejudiced by the unavailability of the original handbrake at trial given the fact that plaintiff had alternative means of presenting his claims to the jury through the use of another similar handbrake assembly. However, plaintiff never requested the opportunity to conduct any measurements or testing using the same type of handbrake on another locomotive. Moreover, plaintiff refused to utilize a model handbrake which defendant had made available at trial in an effort to support his theory that an alleged overly large repair link could somehow cause the application lever to jam.

7. Even had the subject handbrake been retained by Conrail, the handbrake was no longer representative of the condition of the handbrake at the time of plaintiff's claimed accident. While plaintiff, at page 10 of his brief in opposition to Conrail's application for leave, incorrectly asserts that the original handbrake, if available, would have revealed "scarring" or "other deformities" consistent with plaintiff's claim that an oversized chain link was present, any such argument would have been precluded by the fact that the handbrake had been used numerous times by other employees for seventeen days after plaintiff's alleged incident.[2] Further, the uncontradicted testimony reflected there was no evidence of any alleged "oversize" repair link in the brake chain when the handbrake was inspected on both February 15, 1998 and February 20, 1998.

[2] Plaintiff's argument also fails to consider the handbrake could have been abused by co-workers of plaintiff, either accidentally or intentionally, in the interim 17 days after his accident (which would also explain why the handbrake could not be released on March 9, 1998). There was also testimony that a crow bar had been used on March 9, 1998 in an effort to release the handbrake that arguably could have resulted in "scarring" on the handbrake.

Conrail requested at the February 18, 2000 motion hearing, and again in a motion in limine before the November 13, 2000 trial [TR Vol. I at 66-67], that the trial court reconsider its previous presumption ruling and to stay until the close of proofs any claim or argument by plaintiff that a presumption existed. Conrail's request was rejected by the trial court and plaintiff was improperly permitted to "instruct" the jury during his opening argument that the trial court had concluded the subject handbrake was "presumed defective":

> And even though they knew about the injury, they knew about these claims, the defect in this hardware, they destroyed they evidence. The railroad destroyed the evidence. They threw away the chain, they threw away the clevis, they threw away the entire handbrake even though they had this knowledge. **And it is for this reason that this Court has concluded there is a presumption in this case that this handbrake was defective when Mr. Ward went to use it and got hurt on the evening of February 19, 1998**. (Emphasis supplied).

[TR Vol. II at 155]. Plaintiff's counsel was also improperly allowed to remind the jury that the trial court had ruled the handbrake was "presumed defective" during voir dire [TR Vol. II at 35-36] and plaintiff's closing argument. [TR Vol. VII at 99].

Plaintiff's brief in opposition to defendant's application for leave fails to provide any support for the proposition that the plaintiff was entitled to a pretrial "presumption" that the unavailable handbrake was "presumed defective." The cases cited by plaintiff at page 10 of his brief, *Johnson v. Secretary of State*, 406 Mich. 420, 440; 280 N.W. 2d 9 (1979) and *Ritter v. Miejer, Inc.*, 128 Mich. App. 783, 786; 341 N.W. 2d 220 (1983), each rely upon the prior Supreme Court case of *In re Wood Estate*, 374 Mich. 278, 294; 132 N.W. 2d 35 (1965). However, this Court in *Widmayer v. Leonard*, 422 Mich. 280, 286-289; 373 N.W. 2d 538 (1985) expressly noted, "that insofar as *Wood* appears to hold that the trier of fact must be instructed as

to the existence of a presumption and allowed to make a necessary inference (even in the face of rebutting evidence), it is no longer controlling precedent." 422 Mich. 280 at 288-289.

Nor may plaintiff take comfort in the per curium opinion of the Michigan Court of Appeals. As discussed in more detail at pages 18-20 of defendant's application for leave, the Court of Appeals in affirming the trial court misapplied, and in some instances simply ignored, the controlling precedent of this Court's opinions in *Trupiano, supra*, and *Widmayer, supra*.

The Court of Appeals in this case also failed to follow its own prior decisions in *Lagalo v. Allied Corporation* (on remand) 223 Mich. App. 514, 520; 592 N.W. 2d 786 (1991) and *State Farm Mutual Automobile Ins. Co. v. Allen, et al.*, 191 Mich. App. 18, 22; 477 N.W. 2d 445 (1991). The position of the Court of Appeals was also inconsistent with the following unpublished opinions of that court: *Crook v. Detroit Receiving Hospital, Inc.*, 1998 WL 1988882 (Mich. App.); *Price v. Boyer*, 2001 WL 736594 (Mich. App.); *Garrison v. Mount Clemens General Hospital*, 2001 WL 664612 (Mich. App.); and *Bryson v. VTS*, 2003 WL 1880648 (Mich. App.). See also *Sanford v. Sears Roebuck & Co.*, 2004 WL 345362 (Mich. App.). A copy of the foregoing unpublished opinions are attached as **Exhibit 7**.[3]

The Court of Appeals decision in this case that the trial court correctly concluded a "presumption" existed that Conrail had intentionally destroyed evidence was contrary to the appellate court's determination in *Citizens Insurance Co. v. Detroit Edison*, 2001 WL 672174 (Mich. App.) [attached as Exhibit 6 to defendant's application for leave]. In that case, the Court of Appeals noted:

> Here, there was no evidence presented to show that defendant's employees destroyed the downed power line purposely to deprive plaintiffs of the benefit of the evidence. Rather, the lineman who discarded the downed lines after removing them testified that they

[3] Exhibits 1-6 were attached to defendant's application for leave to appeal.

> were not aware that a fire suspected of being electrical in nature had occurred in a nearby home, and that their disposal of the lines was in keeping with standard business practice. Thus, plaintiffs were not entitled to a presumption that the destroyed electrical lines would have been adverse to defendant that would have allowed them to avoid a directed verdict.

2001 WL 672174 at page 3.

II. THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AT THE CLOSE OF TRIAL CONSISTENT WITH M CIV JI 6.01(c):

The jury was permitted by the trial court to consider for eight days the trial court's February 18, 2000 order that the unavailable handbrake was "presumed defective" because it had been "destroyed" by defendant. The trial court then belatedly decided at the conclusion of the case to adopt a handwritten jury instruction submitted by plaintiff which stated:

> The Court made a determination that there was a presumption that the handbrake at issue was defective due to the fact that the handbrake clevis and chain were discarded by the defendant. The defendant railroad has come forward with some evidence to rebut this presumption. Accordingly, the law requires that I instruct you as follows:
>
> Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. The Rules of Evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant.

[TR Vol. VIII at 8]. See also [TR Vol. VI at 6].

Setting aside the overwhelming prejudicial effect of the trial court's prior order that the handbrake was "presumed defective," the trial court's instruction was improper because:

1. The instruction continued to advise the jury of the trial court's prior "presumption" ruling, contrary to this Court's holding in *Widmayer v. Leonard*, 422 Mich. 280, 373 N.W. 2d 538 (1985); and

2. The trial court's instruction failed to include the required language of M Civ JI 6.01 (c). Specifically, the trial court failed to instruct the jury they could only infer the missing handbrake was adverse to defendant, "if you believe that no reasonable excuse for defendant's failure to produce the evidence has been shown." *Clark v. Kmart Corporation*, 249 Mich. App. 141, 147; 640 N.W. 2d 892 (2002).

With respect to the first point, Conrail had repeatedly made the trial court aware of its position that no "presumption" was appropriate, and that the trial court was not permitted to inform the jury of any such presumption. Nevertheless, the trial court continued to improperly reinforce to the jury in its instruction quoted above that, "The court made a determination that there was a presumption that the handbrake at issue was defective..."

With respect to the second point, the trial court was likewise aware (as far back as the February 18, 2000 summary judgment hearing) of Conrail's position that it had provided a "reasonable excuse" as to why the handbrake used by plaintiff was no longer available. Conrail had reiterated this position, both before the start of trial (in a motion in limine) and again during trial. [TR Vol. I at 66; TR Vol. VI at 211-213; TR Vol. VII at 88; TR Vol. VIII at 26].

Indeed, even the trial court recognized that sufficient evidence had been produced which created a question of fact whether defendant had provided a reasonable excuse for the unavailability of the handbrake [TR Vol. III at 88-89] such that the trial court's otherwise flawed instruction reflected, "The defendant railroad has come forward with some evidence to rebut this presumption." It is noteworthy that the "some evidence" referenced in the trial court's instruction was no different in form or substance than the evidence which defendant had presented prior to the February 18, 2000 motion hearing, and reiterated again by defendant in its motion in limine prior to the start of trial. However, the trial court never undertook to explain

how the same "some evidence" which was insufficient to rebut the presumption before trial, had suddenly convinced the trial court at the conclusion of the case to alter its presumption ruling.

In *Clark v. Kmart Corporation, supra*, the Court of Appeals held:

> SJI 2d 6.01(c) should be given where a question of fact arises regarding whether a party has a reasonable excuse for its failure to produce the evidence, the court finds that the evidence was under the parties' control and could have been produced by the party, and the evidence would have been material, not cumulative, and not equally available to the other party.

249 Mich. App. 141 at 147. The trial court committed error in not instructing the jury consistent with the language found at M Civ JI 6.01(c).

The Michigan Court of Appeal simply ignored its own ruling in *Clark, supra*, and defendant's argument on this issue (at pages 12-13 of defendant's brief on appeal) which cited this Court's opinion in *Case v. Consumer's Power Co.*, 463 Mich. 1, 6; 615 N.W. 2d 17 (2000), as well as MCR 2.516(D)(2), as legal authority for the proposition the trial court was required to instruct the jury consistent with M Civ JI 2d 6.01(c) based on the evidence reflecting defendant had provided a reasonable explanation for the unavailability of the handbrake. Likewise, the Court of Appeals incorrectly concluded that defendant had failed to preserve this issue for appellate review as discussed at pages 22-23 of defendant's application for leave.

The Court of Appeals refused to recognize that in light of the trial court's pretrial presumption ruling (which remained in effect throughout the eight day trial), defendant had no reason to even request M Civ JI 2d 6.01(c). In any event, once the trial court finally acknowledged that defendant had come forward with some evidence to rebut the trial court's presumption ruling [TR Vol. III at 88-89], it was incumbent upon the trial court to accurately instruct the jury consistent with M Civ JI 2d 6.01(c). *Clark v. K-Mart Corporation, supra*, at

147; *Chastain v. GMC* (on remand), 254 Mich. App. 576, 590; 657 N.W. 2d 804 (2002). Finally, Conrail did object to the trial court's "revised presumption" instruction. [TR Vol. VIII at 26].

Conrail would additionally note that even if no clear request had been made by defendant for the giving of M Civ JI 6.01(c), defendant was entitled to have the foregoing instruction read to the jury on the basis the instruction "pertains to a basic and controlling issue" in the case (particularly given the trial court's prior erroneous "presumption" ruling). *Reisman v. Regionance of Wayne State University*, 188 Mich. App. 526, 532; 470 N.W. 2d 678 (1991). The trial court's failure to properly instruct the jury under M Civ JI 6.01(c) was "manifestly unjust" requiring reversal by this Court. *Reisman, supra* at 532.

III. DEFENDANT WAS SIGNIFICANTLY PREJUDICED AS A RESULT OF THE TRIAL COURT'S "PRESUMPTION" ORDER AND THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY:

Defendant's right to a fair trial was fatally prejudiced when the jury was "instructed" by plaintiff's counsel at the very commencement of the case that the court had already ruled the handbrake utilized by a plaintiff at the time of his unwitnessed and unreported accident was "presumed defective" because it had been "destroyed" by defendant. No curative or other instruction by the trial court (and certainly no argument by defendant) could erase from the minds of the jury that **"it is for this reason that this Court has concluded there is a presumption in this case that this handbrake was defective when Mr. Ward went to use it and got hurt on the evening of February 19, 1998."** [TR Vol. II (plaintiff's opening) at 155].

The entirety of defendant's case regarding both liability and damages was likewise prejudiced by the trial court's conclusion that defendant had "destroyed" critical evidence. With the blessing of the trial court, plaintiff's counsel "instructed" the jury during opening argument:

> And even though they knew about the injury, they knew about these claims, the defect in this hardware, they destroyed the

> evidence. The railroad destroyed the evidence. They threw away the chain, they threw away the clevis, they threw away the entire handbrake even though they had this knowledge.

[TR Vol. II at 155].

Once informed that defendant had purportedly intentionally destroyed the single most important evidence in the case, any testimony or argument presented by defendant in an effort to explain why the handbrake was unavailable clearly was suspect in the eyes of the jury. Similarly compromised by the trial court's ruling was the credibility of defendant's evidence that, both before and after plaintiff's claimed incident, the handbrake was free of any defect. Finally, given the trial court's ruling that defendant had engaged in the deliberate destruction of evidence, it is readily apparent why the jury would disregard defendant's arguments that plaintiff's subsequent back surgery (more than two years after his claimed accident) was not causally related, and that plaintiff's claimed disability was exaggerated.

The trial court's instruction to the jury at the conclusion of the trial regarding the missing handbrake failed to ameliorate the prejudice suffered by defendant as a result of the court's earlier presumption ruling. Indeed, the trial court's attempt to paraphrase the required language of M Civ JI 6.01(c) inexplicably failed to include that portion of the instruction most essential to defendant's reasonable explanation as to why the handbrake had not been retained.

The trial court failed to instruct the jury that they could infer the missing handbrake would have been adverse to defendant, only if the jury believed that no reasonable excuse had been provided for defendant's failure to produce the evidence. Instead, the court instructed the jury:

> Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or in the control of the defendant. **The rules of evidence provide that you, the jury,**

may infer that this evidence was unfavorable to the defendant.
(Emphasis supplied)

[TR Vol. VIII at 8]. Pursuant to the above instruction, the jury was afforded no alternative, except to infer that the evidence concerning the "destroyed" handbrake, clevis and chain, would have been unfavorable to the defendant.

Remarkably, despite the foregoing clear errors of the trial court, the jury still concluded in their special verdict that: (1) the handbrake used by plaintiff on February 19, 1998 was "in proper condition and safe to operate without unnecessary danger of personal injury" as required by the Federal Locomotive Inspection Act; and (2) that Conrail was not negligent on February 19, 1998. However, given the prejudice and confusion associated with the trial court's earlier ruling that the handbrake was "presumed defective," coupled with the court's eventual instruction that left the jury no alternative but to infer the missing handbrake was "unfavorable" to defendant, the jury found that the handbrake was not "efficient" as required by the Federal Safety Appliance Act and that plaintiff was caused to sustain damages in the sum of $800,000.00.

As explained in more detail in defendant's application for leave at pages 29-35, the errors by the trial court relating to the unavailability of the handbrake provide the only legitimate explanation as to how the jury could conclude both that defendant was not "negligent" and that the handbrake was "in proper condition and safe to operate without unnecessary danger of personal injury," and yet find plaintiff sustained serious injuries to his back requiring surgery because the handbrake was not "efficient."

CONCLUSION

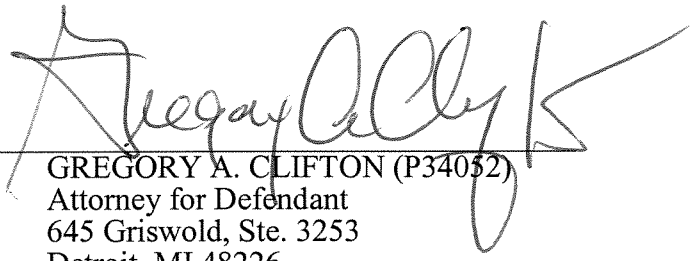
Based upon all of the foregoing, as well as for all of the additional reasons stated in defendant's application for leave to appeal, Consolidated Rail Corporation respectfully requests

pursuant to MCR 7.302(F) that this Court reverse the unpublished per curiam opinion of the Court of Appeals dated August 7, 2003 (except with regard to the ruling eliminated paralegal fees) and enter judgment in favor of defendant, or alternatively, grant defendant a new trial on all issues.

Respectfully submitted,

DURKIN, McDONNELL, CLIFTON
& O'DONNELL, P.C.

DATED: October 29, 2004

By: 

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